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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: KIRA Inc.

File: B-287573.4; B-287573.5

Date: August 29, 2001

Alan M. Grayson, Esq., and James A. McMillan, Esq., Grayson & Kubli, for the protester.

David J. Taylor, Esq., Tighe, Patton, Armstrong, Teasdale, for Environmental Management, Inc., an intervenor.

Sharon A. Jenks, Esq., Department of the Air Force, for the agency.

Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that award was improper because awardee's proposal evidenced an intent to violate solicitation's limitation on subcontracting clause is denied where awardee's proposal instead indicated that it would comply with the subcontracting limitation.
2. Protest that relative weights assigned the evaluation factors in the evaluation and resulting source selection decision were inconsistent with those set forth in the RFP is denied where record shows that award was consistent with evaluation scheme set forth in solicitation; fact that key discriminators among proposals were not the most heavily weighted factor is unobjectionable.

DECISION

KIRA, Inc. protests the Department of the Air Force's award of a contract to Environmental Management, Inc. (EMI), under request for proposals (RFP) No. F24604-01-R-0001, for consolidated facilities maintenance services at Malmstrom Air Force Base. KIRA argues that EMI's proposal indicated an intention to deviate from the terms of the RFP's limitation on subcontracting clause. KIRA further argues that the relative weights assigned the evaluation factors in the award decision were inconsistent with those set forth in the RFP.

We deny the protest.¹

The RFP, a small business set-aside, requested proposals to perform numerous facilities-related services, including facilities and grounds maintenance, custodial services, refuse and recycling removal services and simplified acquisition for base engineering requirements (SABER). Offerors were advised that the agency would make award to the firm submitting the proposal deemed to offer the best overall value, considering both cost and non-cost factors. For evaluation purposes, the RFP provided that proposals would be rated either blue (exceptional), green (acceptable), yellow (marginal) or red (unacceptable), and also would be rated either low, moderate or high proposal risk, under five subfactors included within a mission capability factor (listed in descending order of importance): program management, SABER sample project technical evaluation, quality, increased coverage and cost visibility. The proposals also were to be evaluated for past performance (equal in weight to mission capability), under which factor they would be assigned adjectival/confidence ratings of exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence. Cost was to be evaluated for reasonableness and realism. Mission capability, past performance and proposal risk, together, were significantly more important than cost.

After receiving and evaluating initial proposals, engaging in discussions and obtaining final proposal revisions, the agency assigned identical adjectival and past performance ratings to the proposals submitted by KIRA and EMI. Specifically, both proposals received green/low risk ratings for the program management, SABER sample project and cost visibility subfactors, and blue/low risk ratings under the quality and increased coverage subfactors of the mission capability criterion. Both proposals also received very good/significant confidence past performance ratings, and both firms' proposed costs--EMI's was \$41.3 million and KIRA's \$44.3 million--were found to be reasonable and realistic. In addition to the adjectival ratings, the agency evaluators and source selection official prepared narrative materials in which they further distinguished among the competing proposals. As is relevant here, those narrative materials show that EMI's was found to be the best proposal under the quality and increased coverage subfactors. Specifically, under the quality subfactor, the agency found that EMI offered enhanced service levels and also provided the best justification of its approach to achieving the proposed service levels. Under the increased coverage subfactor, the agency found that EMI provided more coverage at a lower overall cost than KIRA. Source Selection Decision (SSD) at 7. Finally, under the SABER sample project technical evaluation subfactor, the SSD stated that the proposal of EMI was "as strong or stronger" than the proposal of

¹ This is our second decision in connection with this acquisition. KIRA previously raised other protest bases which we denied in KIRA, Inc., B-287573 et al., July 23, 2001, 2001 CPD ¶ ____.

KIRA. Id. at 3. The agency concluded that EMI's lower cost, coupled with the identified technical strengths, made its proposal the best value; the agency therefore made award to EMI.

KIRA asserts that EMI's proposal indicates an intent to violate the RFP's limitation on subcontracting clause, Federal Acquisition Regulation (FAR) § 52.219-14, which requires that at least 50 percent of the cost of contract performance incurred for personnel be expended for employees of the prime contractor. In support of its position, KIRA notes that the agency's performance confidence rationale for EMI describes the distribution of work between EMI and its proposed subcontractors as follows:

[Washington Group International (WGI)] intends to perform SABER (47% of the contract based dollar amount), EMI intends to perform grounds maintenance, and custodial (16% of the contract based dollar amount), WGI and EMI intend to jointly perform facility maintenance (30% of the contract based dollar amount), and Montana Waste Systems (MWS) intends to perform refuse and recycling (7% of the contract based dollar amount).

EMI and WGI Performance Confidence Rationale at 1. KIRA maintains that this shows that the agency expressly determined that EMI would perform only 16 percent of the requirement itself and would perform an additional 30 percent of the requirement with its subcontractor WGI, with the remainder of the requirement (approximately 54 percent) being performed by EMI subcontractors. KIRA argues in the alternative that, if EMI's proposal is compliant with the limitation on subcontracting clause, then the agency's evaluation conclusions in the performance confidence rationale are unreasonable because they are based on a different division of work between EMI and its subcontractors than that outlined in EMI's proposal.

We find KIRA's protest in this regard to be without merit. As a general rule, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, and the contractor's actual compliance with the provision is a matter of contract administration. Orincon Corp., B-276704, July 18, 1997, 97-2 CPD ¶ 26 at 4. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation, we have considered this to be a matter of the proposal's technical acceptability; a proposal that fails to conform to a material term or condition of the solicitation such as the subcontracting limitation is unacceptable and may not form the basis for an award. Coffman Specialties, Inc., B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ 77 at 5.

Here, the record shows that the percentages attributed to each of the contract elements in the performance confidence rationale were not based on information in the offerors' proposals. Rather, according to the agency, the percentages reflected

the historical dollar value of the contract elements, which previously were the subject of several separate contracts that were consolidated under the current RFP. That is, the percentages set forth in the performance confidence rationale reflect the portion of the current estimated total requirement represented by each of the various elements based on the historical dollar value of that prior work. The agency's explanation in this regard is supported by the fact that the same percentage values used for EMI's performance confidence determination were used in the agency's past performance/risk evaluation for all of the technical proposals, including KIRA's. Agency Report, July 23, 2001, at 1-2.²

In addition, the agency has submitted a detailed analysis of the EMI cost proposal which shows that under EMI's proposal, more than 50 percent of the cost of contract performance incurred for personnel would be incurred with respect to EMI's own employees (as opposed to the employees of its subcontractors).³ Further, KIRA has made no attempt to challenge the agency's analysis in this regard, despite having been furnished the relevant portions of the EMI cost proposal. Under these circumstances, we find that KIRA has failed to show that there was anything in EMI's proposal from which the agency reasonably should have concluded that EMI would not comply with the limitation on subcontracting clause.

Nor has KIRA shown that the agency's past performance/risk evaluation with respect to EMI's proposal was unreasonable. In this regard, the agency found that EMI had performed only one prior contract that was similar in magnitude and complexity to

² In this regard, we note that accepting the percentages set forth in the performance confidence rationale for KIRA would lead to the conclusion that KIRA also was noncompliant with the limitation on subcontracting clause since, according to those percentages, KIRA will perform only 30 percent of the total requirement.

³ The agency's calculations, supported by relevant portions of EMI's cost proposal, show that, for grounds maintenance, custodial services, facilities maintenance, and refuse and recycling services, EMI will expend [deleted] for personnel costs during the phase-in and basic period of contract performance, whereas its subcontractors will expend [deleted] during the same period. Agency Report, July 23, 2001, at 2, and Contracting Officer's Affidavit at 1-6. Further, the agency's calculation that more than 50 percent of the cost of contract performance incurred for personnel would be incurred with respect to EMI's own employees is consistent with the finding of the Small Business Administration (SBA), in connection with denying a size standard protest, that of the 63 employees allocated for contract performance here, 45 would be EMI employees (and also that 5 of the 7 managers assigned to perform the contract would be EMI managers). SBA Size Determination, No. 6-2001-039, Apr. 18, 2001, at 4.

the contemplated contract effort here, and had received only a satisfactory rating of its performance under that contract. On the basis of EMI's experience and ratings alone, the agency found that there was "some doubt," representing a "slight increas[e]" in doubt, that EMI could successfully perform the contract. EMI and WGI Performance Confidence Rationale at 1-2. However, the agency further determined that WGI's extensive experience and above average ratings, "coupled with the magnitude of their participation in this proposal," reduced the overall doubt as to successful performance. Id. at 2.

Although, as noted above, the percentage of the contemplated overall contract effort attributed to WGI for purposes of the past performance/risk evaluation was based on the historical dollar value of the various contract elements and not on EMI's actual proposal here, and this appears to have understated the proportion of the proposed overall effort that EMI itself would perform, this does not mean that the agency's past performance/risk evaluation was unreasonable. While the percentage of WGI's participation in the contract effort as reflected in EMI's proposal may be somewhat less than that assumed for purposes of the past performance/risk evaluation, it is clear that EMI proposed that WGI would perform a major portion of the contemplated effort. Thus, it was not unreasonable for the agency to take into account WGI's superior, relevant past performance when assessing the EMI team's overall likelihood of successful contract performance and assigning an overall past performance/risk rating. Federal Acquisition Regulation § 15.305(a)(2)(iii); NAHB Research Ctr., Inc., B-278876.2, May 4, 1998, 98-1 CPD ¶ 150 at 4; Fluor Daniel, Inc., B-262051, B-262051.2, Nov. 21, 1995, 95-2 CPD ¶ 241 at 12. We therefore deny KIRA's protest of the evaluation in this area.

KIRA further argues that the relative weights assigned the evaluation factors in the evaluation and resulting award decision were inconsistent with those set forth in the RFP. In this connection, the RFP stated that the subfactors under the mission capability evaluation criterion were listed in descending order of importance. According to KIRA, the agency instead improperly assigned equal weight to the subfactors, and in so doing, improperly found EMI's proposal technically superior to KIRA's. As support for its assertion, KIRA notes that its proposal was rated superior under the first and fifth subfactors, while the EMI proposal was rated superior under the third and fourth subfactors; according to KIRA, if the agency had properly weighted the subfactors in descending order of importance, its proposal would have been deemed superior based upon its superior rating under the first (most important) subfactor. As further support for its assertion, KIRA notes that the source selection authority (SSA) stated during the pendency of the protest that the subfactors under the mission capability criterion were considered "roughly equal." SSA Statement, June 22, 2001, at 1.

We find no basis to object to the agency's source selection decision. Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results, and their

judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria. Chemical Demilitarization Assocs., B-277700, Nov. 13, 1997, 98-1 CPD ¶ 171 at 6.

KIRA has not shown that the source selection decision was inconsistent with the stated evaluation criteria or otherwise unreasonable. As noted, the agency's source selection decision reflects its conclusion that EMI's proposal was superior under the quality subfactor of the mission capability criterion, based on EMI's offer of (and justification for ability to provide) enhanced service levels exceeding those offered by KIRA, and superior under the increased coverage subfactor, based on its offer of significantly greater coverage—including approximately [deleted] percent more custodial coverage and approximately [deleted] percent more grounds maintenance coverage—than offered by KIRA. SSD at 4. While KIRA is correct that the quality and increased coverage subfactors were listed in the RFP as less important than the program management subfactor (under which KIRA's proposal was deemed more advantageous), the mere fact that an agency's source selection decision turns on an evaluation consideration that is designated as less important is unobjectionable since there is no requirement that the key award discriminator be the most heavily weighted factor. Research for Better Schools, Inc., B-270774.3, June 17, 1996, 96-2 CPD ¶ 41 at 8. Furthermore, KIRA's argument fails to account for the fact that EMI's proposal offered significant cost savings (approximately \$3 million) relative to KIRA's proposal.

Nor does the statement made by the SSA during the course of the protest that the subfactors under the mission capability criterion were considered "roughly equal," SSA Statement, June 22, 2001, at 1, furnish a basis for questioning the source selection. In this regard, the SSA subsequently explained the agency's understanding of the relative weight of the mission capability subfactors as follows:

When the grading system was identified, and throughout the evaluation process, the relative weight between subfactors was always seen as being fairly small. Because the subfactors were considered to be clustered closely together, no effort was made to specify the extent to which one factor outweighed another. If there had been significant differences in the subjective weights, those differences would have been clearly stated in Section M [of the RFP], as they were for the four major factors (mission capability, past performance, proposal risk, and cost) in section M-3(a).

SSA Statement, July 24, 2001, at 2. This explanation reflects an understanding that there were differences, albeit relatively small, between the weight of the subfactors. Although this understanding was not well expressed by the phrase "roughly equivalent" as used in the SSA's post-protest statement, we have no basis to question that proposals in fact were evaluated consistent with this understanding, and we do

not view this understanding to be inconsistent with the evaluation scheme set forth in the RFP.⁴

In these circumstances, we find no basis to question the Air Force's determination that EMI's offer of enhanced quality and greater coverage at a lower cost warranted award to that firm.

We deny the protest.

Anthony H. Gamboa
General Counsel

⁴ In any case, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F. 3d 1577, 1581 (Fed. Cir. 1996). In this regard, KIRA has not demonstrated that it would have materially altered its proposal if it had been advised that the subfactors under the mission capability criterion were weighted differently. Cf. Foundation Health Federal Servs., Inc.; Humana Military Healthcare Servs., Inc., B-278189.3, B-278189.4, Feb. 4, 1998, 98-2 CPD ¶ 51 at 14-15.